Nos. 85-792 and 85-793

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

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On December 1, 1986, this Court invited the parties to file supplemental briefs limited to the following question:

> In view of 28 U.S.C. § 2344, 49 U.S.C. § 10327(i), and the passage of more than 60 days between (1) respondents' appeals from the Interstate Commerce Commission's October 25, 1983, order, declining to reconsider its May 18, 1983, order regarding respondent Brotherhood of Locomotive Engineers' motion for clarification, and (2) service of the Commission's May 18, 1983, clarification order, did the appeals properly bring before the reviewing court the May 18, 1983, order?

1. The Administrative Orders Review Act, 28 U.S.C. (& Supp. II) 2341 *et seq.*, also known as the Hobbs Act, sets forth procedures for judicial review of the orders of certain agencies, including the Interstate Commerce Commission. Section 2344 specifically provides (28 U.S.C. 2344):

> Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

Section 10327(i) of the Interstate Commerce Act (ICA) provides that in rail cases (49 U.S.C. 10327(i)):

> Notwithstanding this subtitle, an action of the Commission under this section and an action of a designated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

In the present case, respondents Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) sought judicial review under the following circumstances:

> (i) On October 20, 1982, the Commission served an order approving a proposed consolidation of the Union Pacific, Missouri Pacific, and Western Pacific Railroads and providing related trackage rights to the Missouri-Kansas-Texas Railroad (MKT) and the Denver & Rio Grande Western Railroad (DRGW).[1]
>
> (ii) On April 4, 1983, BLE filed a "Petition for Clarification" requesting the Commission to clarify "its intent as to the crew manning or assignments of the trains to be operated by [MKT and DRGW]" under the Commission approved trackage rights (C.A. App. 2).

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[1] *Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R. – Control – Missouri Pacific Corp. & Missouri Pacific R.R.*, 366 I.C.C. 462 (1982).

(iii) On May 18, 1983, the Commission served a decision denying the petition, finding no need for clarification (Pet. App. 51a-54a).

(iv) On May 31, 1983, BLE filed a "Petition for Reconsideration" of the Commission's May 18, 1983 decision (C.A. App. 47-55), which was timely under the Commission's rules.[2]

(v) On June 7, 1983, UTU, which had not joined in BLE's petition for clarification, filed a "Petition for Reconsideration" (C.A. App. 71-84).

(vi) On October 25, 1983, the Commission served an order denying the petitions for reconsideration (Pet. App. 55a-68a).

BLE filed its petition for judicial review of the Commission's orders on December 16, 1983, and UTU filed a similar petition on December 23, 1983. The Commission urged the court of appeals to dismiss these petitions on the ground that they raised an untimely challenge to the Commission's October 20, 1982 decision. The court of appeals concluded that the petitions for judicial review were timely for purposes of reviewing the October 20, 1982 order because the unions "had no notice of their present claim until after ICC denied their [*sic*] petition for clarification and reconsideration thereof" (Pet. App. 12a). The court further stated (*id.* at 13a):

> Nor can it be claimed that the petition should be barred because it was not filed within 60 days after the May [1983] decision. For the Commission then undertook extensive review and issued a lengthy opinion in October [1983]. If the motion for reconsideration is filed within the statutorily prescribed

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[2] The Commission's appellate procedures permit the filing of a petition for reconsideration within 20 days after service of a Commission decision. See 49 C.F.R. 1115.3.

> review period, the time limitation tolls until the agency issues its final decision on the motion for reconsideration, *see Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960); *Davis, supra,*[3] 735 F.2d at 1391 n.5, and it is tolled while the agency is giving full consideration to the issues presented for judicial review, *see Nat'l Insulation Transportation Committee v. ICC*, 683 F.2d 533, 543 n.17 (D.C. Cir. 1982).

Judge MacKinnon dissented from the majority's conclusion that the petitions for judicial review were timely for purposes of reviewing the Commission's October 20, 1982 order (Pet. App. 26a). He did not address whether the petitions should be time-barred because they were not filed within 60 days of the May 18, 1986 Commission order.

2. We maintain that the unions' petitions for judicial review were untimely for the purpose of reviewing the Commission's October 20, 1982 order. The petitions were timely for the purpose of reviewing the Commission's denial of BLE's petition for clarification, but the scope of the court of appeals' review should have been limited to whether the Commission abused its discretion in concluding that the October 20, 1982 consolidation decision "does not require clarification" (Pet. App. 53a). See Gov't Br. 22 n.16.

The Commission's decision denying BLE's petition for clarification was a final order for purposes of the Hobbs Act.[4] BLE was therefore required to seek judicial review

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[3] *National Bank of Davis v. Comptroller of the Currency*, 725 F.2d 1390 (D.C. Cir. 1984) (per curiam).

[4] The Commission's authority to entertain post-consolidation petitions for clarification derives from its general powers, under Section 10321, "in carrying out this subtitle" (49 U.S.C. 10321). See *ICC v. American Trucking Ass'ns*, 467 U.S. 354, 364-365 (1984); 49 C.F.R. 1117.1 (providing that the Commission may consider petitions for relief not otherwise covered by the Commission's rules). Notably, a petition for clarification, even if granted, could only explain, and

within 60 days of that decision. 28 U.S.C. 2344. However, under established D.C. Circuit and Commission practice, the filing of a petition for reconsideration generally postpones the running of the Hobbs Act's 60-day time limit. See *Pennsylvania* v. *ICC*, 590 F.2d 1187, 1192-1193 (D.C. Cir. 1978); *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 147, 151 (D.C. Cir. 1961); *Outland* v. *CAB*, 284 F.2d 224, 227 (D.C. Cir. 1960); cf. *National Bank of Davis* v. *Comptroller of the Currency*, 725 F.2d at 1391-1392. This Court recognized that practice in *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970), stating (*id.* at 541):

> Unless Congress provides otherwise, "[w]here a motion for rehearing is in fact filed there is no final action until the rehearing is denied." *Outland* v. *CAB*, 109 U.S. App. D.C. 90, 93, 284 F.2d 224, 227.

See *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 326 (1961); see also *B.J. McAdams, Inc.* v. *ICC*, 551 F.2d 1112, 1114-1115 (8th Cir. 1977). Other circuits follow this practice. See, *e.g.*, *Texas* v. *United States*, No. 86-4430 (5th Cir. July 2, 1986) (reprinted as Addendum, *infra*, 1a-3a); *C.O.D.E., Inc.* v. *ICC*, 768 F.2d 1210, 1211-1212 (10th Cir. 1985); *Aeromar, C. Por A.* v. *Dep't of Transportation*, 767 F.2d 1491, 1493 (11th Cir. 1985); *Cities of Newark, New Castle & Seaford* v. *FERC*, 763 F.2d 533, 544-545 (3d Cir. 1985); *California Tribal Chair-*

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could not *modify*, the terms of a prior Commission order. The Commission's authority to modify its prior rail consolidation orders is limited by Section 10327(g), which conditions the reopening of a prior proceeding upon "material error, new evidence, or substantially changed circumstances" (49 U.S.C. 10327(g)) and by Section 11351, which provides that the Commission "may make appropriate orders supplemental to an order made in a proceeding under sections 11342-11345 and 11347 of this title" only when "cause exists" (49 U.S.C. 11351). See Gov't Br. 35 n.23.

man's Ass'n v. *United States Dep't of Labor*, 730 F.2d 1289, 1290-1291 (9th Cir. 1984); *Cartersville Elevator, Inc.* v. *ICC*, 724 F.2d 668, 672, aff'd en banc, 735 F.2d 1059, 1061 (8th Cir. 1984).[5]

Congress has not provided an exception from the general practice in the present case. Section 10327(i) does state that "an action of the Commission under this section * * * is final on the date on which it is served" (49 U.S.C. 10327(i)). The Commission's denial of BLE's petition for clarification is therefore final action in the sense that "a civil action * * * *may* be filed after that date" (*ibid.* (emphasis added)). Nevertheless, the Commission interprets the relevant statutes to provide that if an aggrieved party timely petitions the Commission to reconsider its otherwise "final" action, the commencement of the Hobbs Act's 60-day time limit will be delayed until the Commission has disposed of the petition.

This interpretation is consistent with the objectives of Section 10327(i). That Section's "final" action specification originated in Section 303 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 Stat. 48-51, which added the finality

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[5] A different result obtains, of course, if the party fails to file its petition for administrative reconsideration within the time prescribed by statute or by the agency's rules, or if the party seeks other types of agency relief. For example, "[p]etitions to reopen, because they may be filed at any time after a final order, have not been permitted to toll the 60-day period for filing a petition for judicial review." *Cartersville Elevator, Inc.*, 724 F.2d at 672 (citing *Provisioners Frozen Express, Inc.* v. *ICC*, 536 F.2d 1303 (9th Cir. 1976)).

We also note that while some of these cases (*e.g.*, *C.O.D.E., Inc.*, 768 F.2d at 1212) discuss the issue in terms of "tolling" the 60-day review period, it is clear in each of the cases that the aggrieved parties were allowed a full 60-day time period, beginning from the Commission's denial of a petition for reconsideration, in which to file a petition for judicial review (see, *e.g.*, *id.* at 1211). Any other result would be unworkable in agency proceedings involving multiple parties.

provision as former Section 17(9)(h) of the ICA, 49 U.S.C. (1976 ed.) 17(9)(h). Congress enacted Section 303 as part of its general effort to streamline Commission proceedings. See S. Conf. Rep. 94-595, 94th Cong., 2d Sess. 136, 159-162 (1976); H.R. Rep. 94-725, 94th Cong., 1st Sess. 61-62, 105-107 (1975); S. Rep. 94-499, 94th Cong., 1st Sess. 60-62 (1975). Prior to the 4-R Act, the ICA *required* a party in a rail case to petition the Commission for reconsideration of an administrative order before seeking judicial review. See 49 U.S.C. (1970 ed.) 17(9). Congress, through the revisions contained in Section 303, enabled the party to by-pass that process and seek immediate judicial review. Nothing in Section 303's language or legislative history indicates, however, that Congress envisioned that a party *must* seek judicial review within 60 days of the Commission's decision, even though a petition for administrative reconsideration is pending.

The D.C. Circuit's decision in *Pennsylvania* v. *ICC*, *supra*, supports the Commission's interpretation. That case involved a challenge to the Commission's approval of a rail carrier's proposed tariff. The Commission's review was subject to procedures originating in Section 202(e)(2) of the 4-R Act, Pub. L. No. 94-210, 90 Stat. 37, which were codified in former Section 15(8)(a) of the ICA. See 49 U.S.C. (1976 ed.) 15(8)(a) (amended and recodified at 49 U.S.C. 10707). Former Section 15(8)(a) required the Commission to complete its hearings and issue a "final decision" on the lawfulness of the tariff not later than seven months after the tariff was scheduled to become effective (*ibid.*). The Commission issued a final decision and later rejected timely petitions for reconsideration (590 F.2d at 1190-1191). Interested parties then sought judicial review within 60 days of the denial of the petitions for reconsideration but more than 60 days after the "final decision," and the Commission attempted to dismiss the requests for judicial review as untimely (*id.* at 1191-1192). The court of appeals concluded that "to consider the

'final decisions' within 7 months required by § 15(8)(a) as entailing 'finality' for purposes of the Hobbs Act seems clearly mistaken" (590 F.2d at 1193). The court observed that the 4-R Act was intended to expedite Commission proceedings, but stated (*id.* at 1194):

> Administrative reconsideration is a more expeditious and efficient means of achieving an adjustment of agency policy than is resort to the federal courts, and it is hard to see why a Congress concerned to hasten the process of implementing new railroad tariffs would have wanted to restrict the availability of this avenue of appeal.

The D.C. Circuit's reasoning in *Pennsylvania* is fully applicable in this case. A requirement that parties to ICC rail carrier proceedings seek judicial review within 60 days of a Commission order, even if a petition for administrative reconsideration is pending, would discourage administrative resolution of disputes, increase the burdens on reviewing courts, and disrupt the process of orderly judicial review of agency action. See, *e.g.*, *B.J. McAdams, Inc.*, 551 F.2d at 1114-1115; cf. *United States* v. *Benmar Transport & Leasing Corp.*, 444 U.S. 4 (1979) (per curiam). We do not believe that Congress intended those results. Indeed, a refusal to postpone the commencement of the Hobbs Act time limit would be particularly incongruous in this case, where the Commission's denial of the petition for reconsideration contained an extensive elaboration of the basis for the Commission's original decision. Cf. *Bowman* v. *Loperena*, 311 U.S. 262 (1940).

It is therefore respectfully submitted that the unions' petitions for judicial review were timely for the purpose of reviewing the Commission's May 11, 1983 order denying BLE's petition for clarification.

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DECEMBER 1986

ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4430

STATE OF TEXAS, PETITIONER

v.

UNITED STATES OF AMERICA, AND
INTERSTATE COMMERCE COMMISSION, RESPONDENTS.

[Filed July 2, 1986]

On Petition for Review of Order of the Interstate Commerce Commission

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Before JOLLY, DAVIS and HILL, Circuit Judges.

BY THE COURT:

In this administrative matter, we must decide when a petition for review of an Interstate Commerce Commission decision should be filed with this court, when discretionary review of that decision has been sought before the ICC.

A subsidiary of Armstrong World Industries, Inc. hired Reeves Transportation to transport its products to its customers. Reeves brought carpet from Dalton, Georgia to a terminal facility in Arlington, Texas, deposited the carpet there under an ICC storage-in-transit order, and later shipped the carpet to points within Texas. The State of Texas decided that this second leg of the journey from the Arlington terminal to the final destination constituted intrastate commerce, and filed suit in state court alleging that Reeves did not have the permits required for intra-

state shipments under Texas law. In a parallel proceeding before the ICC, however, the ICC decided that the shipments constituted interstate commerce. Two unnamed parties have petitioned the ICC for discretionary review of that decision.

Texas petitioned for our review of the ICC decision at this time to avoid being precluded by the sixty-day statute of limitations for seeking judicial review of an ICC decision. 28 U.S.C. § 2344. Texas also sought to stay further proceedings in our court. Texas contends that it is unclear in the Fifth Circuit whether the sixty-day period will run from the date of the ICC decision or from the date of final disposition of the petition for discretionary review. Armstrong moves to intervene and argues that the appeal should not be stayed because the ICC can file a record and supplement that record as necessary.

The ICC, on the other hand, contends that Texas's petition for review should be dismissed without prejudice, basing its argument on the authority of cases from other circuits and on the need to avoid delay and forum shopping. *C.O.D.E., Inc. v. ICC*, 768 F.2d 1210, 1211 (10th Cir. 1985); *Cartersville Elevator, Inc. v. ICC*, 724 F.2d 668, 672 (8th Cir. 1984), *aff'd on reh'g* 735 F.2d 1059 (1985) (en banc); *B.J. McAdams, Inc. v. ICC*, 551 F.2d 1112, 1115 (8th Cir. 1977). No Fifth Circuit case appears to have considered this precise question.

We hold that the sixty-day period runs from the date the ICC enters its final disposition of the petition for discretionary review. This holding promotes judicial economy, since it avoids the filing of petitions for review, such as Texas' here, merely to avoid being precluded. Furthermore, subsequent ICC action on petitions for discretionary review may possibly make any action by an appellate court unnecessary.

IT IS THEREFORE ORDERED that the motion of the petitioner to stay further proceedings in the court of appeals is DENIED.

IT IS FURTHER ORDERED that the motion of Armstrong World Industries, Inc., to intervene is DENIED.

IT IS FURTHER ORDERED that the motion of the respondents to dismiss without prejudice to the petitioner's right to file a petition for review within sixty days after entry of the ICC's decision disposing of the pending petitions for reconsideration is GRANTED. Furthermore, the ICC should advise the petitioner and all other parties to its proceedings when the petitions for reconsideration are ruled upon.

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